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IN THE

Supreme Court of the United States

October Term, 1972

MELVIN R. LAIRD,
SECRETARY OF DEFENSE, *et al.*,
Petitioners,

v.

MICHAEL B. ANDERSON, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I. RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Every cadet and midshipman at the United States Military Academy and United States Naval Academy and every cadet in his first, second or third year at the United States Air Force Academy[1] is required to attend church or chapel

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[1] No explanation was ever offered for exempting seniors at the United States Air Force Academy from the mandatory chapel requirement. Presumably they are thought to be less in need of the benefits of compulsory attendance at worship than their counterparts at West Point or Annapolis.

services every Sunday morning. The regulations are unequivocal in their langugage (*e.g.*, "No cadet is exempt" . . . "All midshipmen will attend . . .") and severe penalties, including marching tours, demerits, confinement to quarters, and possible expulsion, are imposed upon violators (App. 12, 15, 19).[2]

Cadets and midshipmen are given some choice as to which worship service they will attend, but their choices are severely limited by the regulations. At West Point, a cadet must attend one of three on-campus chapel services (Catholic, Protestant or Jewish, Pl. Ex. 21, App. 138). At the Naval Academy, midshipmen may elect to attend a denominational service in the town of Annapolis (Pl. Ex. 15, App. 136), while at the United States Air Force Academy, a cadet is permitted to attend services at an "established and cooperating" church in Colorado Springs (App. 21). (See, also, App. A, p. 370, fn. 5.) Any cadet or midshipman who is able to prove "beyond a reasonable doubt" to the Academy authorities that chapel attendance would be "counter-productive" for him may be excused (Tr. 79, App. 93). At the Naval Academy, there have been three cases of such excusals in the past forty years. At West Point, no cadet has ever been excused (App. 81, 86, 123, 126-7).[3]

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[2] "App." refers to the Appendix in the Court of Appeals. References to the appendix to the Petition are shown as "Appendix A," "Appendix B," etc.

[3] Four cadets at West Point who sought unsuccessfully to be excused from mandatory chapel in 1969 were called "trouble makers" and were invited to resign from the Academy (App. 125-6). There is no evidence of how many, if any, cadets at the Air Force Academy have ever been excused.

In determining whether a cadet or midshipman has carried his burden of proof on the issue of chapel attendance being "counter-productive" for him, it is not sufficient, in the view taken by the Department of Defense that the man may be an atheist who does not believe in a Supreme Being (App. 96-7), or that mandatory attendance violates the cadet's conscience (App. 96), or that he feels that compulsory chapel attendance is inhibiting his moral development (App. 136-7).

The Academy regulations restrict the free transfer of cadets and midshipmen from one church or chapel service to another. A cadet desiring to change his place of attendance must first get the permission of the "sending chaplain," the "receiving chaplain" and his parents (App. 13, 15, 20). Regulation 1502(1)(a) of the Naval Academy provides that requests for transfers ". . . based on the mere personal whims of the midshipman, rather than a sincere desire to affiliate with the stated denomination, will not be approved." (App. 15.)

Relevant academy catalogues and other publications illustrate the fundamentally religious purpose of compulsory chapel. The objective, as stated, is to provide a "sound basic religious atmosphere" (App. 148). This objective presumably stems from "the fact that biblical faith is the foundation stone of honor and integrity." (App. 154.)[4]

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[4]Consistent with this theory is Admiral Moorer's testimony that an atheist would inevitably lack "certain qualities" necessary for military leadership (App. 101).

In his affidavit filed in opposition to plaintiff's motion for preliminary injunction, upon which affidavit petitioners rely (Petition, pp. 3, 5) General Samuel Koster, then Superintendent of the Military Academy at West Point, modified the above-quoted excerpt

(Continued)

Midshipmen at the Naval Academy are told that they must regularly attend Divine Worship Services "because we are 'one nation under God'" (App. 145). The regulations are based on Title 10 U.S. Code, §6031, which states, in part ". . . commanders of vessels and naval activities to which chaplains are attached shall cause Divine Service to be performed on Sunday . . .; and it is earnestly recommended to officers, seamen, and others in the naval service diligently to attend every performance of the worship of Almighty God" (App. 33).[5]

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[4] (Continued)

from the official statement of policy by substituting the more neutral term "moral values" for "biblical faith" (App. 30). Subsequent to the filing of this affidavit, General Koster resigned as Superintendent at West Point when he was accused of suppressing information about the mass killing of civilians at Mylai. As former commander of the Americal Division, units of which were involved in the killings, General Koster was ultimately demoted, censured and stripped of his Distinguished Service Medal for the part he played in the aftermath of the killings. New York Times, May 20, 1971, 1:4.

[5] That this purpose is well recognized by many of those who are subjected to the requirement is indicated in the *amicus* brief of John W. Malley who candidly urges that the compulsory chapel regulations be retained in that they encourage a "sense of duty in the service of God and Country" and that they ". . . recognize belief and faith in the Creator" (*Amicus* Brief of John W. Malley, pp. 2, 7 and passim).

Notwithstanding this rather clear expression of religious purpose, the principal Government witnesses at trial testified that the *sole* purpose of the chapel regulations was to enable cadets and midshipmen to observe how *others* worship, so that they might some day be able to comprehend and deal with the religious needs of their men in times of crisis (App. 93 (Assistant Secretary of Defense Roger Kelley); App. 99-100 (Admiral Moorer)). The transfer

(Continued)

The uncontradicted evidence shows that compulsory attendance at worship directly violates the expressed tenets of most of the major faiths prevalent in this country (App. 62, 64-6, 72, 115, 153-A) and has caused large numbers of cadets and midshipmen to become permanently alienated from religion by what they perceive as the utter hypocrisy of the theory and application of the regulations (App. 61-2, 63, 68, 84-5, 115, 127-8, 136). In addition, a variety of religious leaders, representing the gamut of the principal religious denominations in the United States,[6] testified that the primary effect, on balance, was one of serious harm to religion in general, and to the religious lives of the individuals concerned in particular (*e.g.*, App. 63-4, 69, 72).

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[5] (Continued)

restrictions (p. 3, *supra*) are, of course, hopelessly at odds with this secular training purpose. One would expect that transfers would be encouraged, rather than prohibited, if the goal were truly to familiarize cadets with the diverse religious backgrounds of armed forces personnel.

[6] Plaintiff's clerical witnesses included a Baptist minister with over 23 years of service as a Navy chaplain (Reverend Glyn Jones), the dean of Boston College Law School (Father Robert Drinan), a former Jewish chaplain (Rabbi Eugene Lipman), an Episcopal chaplain and professor at American University (Rev. Earl H. Brill), the secretary of the General Commission on Chaplains for Armed Forces Personnel (Rev. A. Ray Applequist), and the Director for Civil and Religious Liberty of the National Council of Churches (Rev. Dean M. Kelley).

We think it is significant that the Government produced no chaplains or other religious leaders whatever to defend the practice of mandatory chapel.

II. REASONS FOR DENYING THE WRIT

It is readily apparent from a reading of the considerations governing review on certiorari (Rule 19, Rules of the Supreme Court) that the only possible criteria which could even remotely be considered applicable to a grant of certiorari in this case are the third and fourth clauses of Rule 19(1)(b).[7] Unless the Government can plausibly contend that the legality of governmental compulsion to attend religious worship is still an open question in this Court, or that the decision of the court below is in conflict with applicable decisions of this Court, then certiorari should not be granted. Neither contention can be sustained.

Few propositions are more solidly established in the jurisprudence of the First Amendment than that the Government may not compel church attendance.[8]

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[7] Rule 19(1)(b) provides as follows:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

[8] Even those who disagree with this Court's decisions in the area of school prayers would concede that compulsory participation in religious activity is not to be condoned. *E.g.*, Griswold, "Absolute Is in the Dark," 8 Utah L. Rev. 167, 35 N.Y.S. Bar J. 212 ("I

(Continued)

In the first and most frequently cited case construing the Establishment Clause, Justice Black set forth its *minimum* scope as follows:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or remain away from church* against his will or force him to profess a belief or disbelief in any religion. *No person can be punished for* entertaining or professing religious beliefs or disbeliefs, *for church attendance or nonattendance.* . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to 'erect a wall of separation between church and state.' *Everson v. Board of Education*, 330 U.S. 15, 16 (1946) (emphasis added).

This quotation from *Everson* has been repeated and reaffirmed in several subsequent cases. *McCollum v. Board*

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[8] (Continued)

find it hard to see that there is anything wrong or oppressive in making that law applicable to all members of the community—as long as the persons who do not care to observe Sunday themselves are not *compelled* to do anything," *ibid.*, 35 N.Y.S. Bar J. at 224, 8 Utah L. Rev. at ___.) It would appear from the Petition that the Solicitor General has changed his mind since writing the above.

of Education, 333 U.S. 203, 210-11 (1947); *McGowan v. Maryland,* 366 U.S. 420, 443 (1960); and *Torcaso v. Watkins,* 367 U.S. 488, 492-3 (1960).

We think that this Court in *Everson* intended to set forth certain categories of absolutely proscribed conduct. Thus, the federal government cannot, for example, require a person to profess a belief in the divinity of Christ, regardless of what secular purpose or effect might be involved. The clear message of *Everson* is that certain limited areas, such as profession of religious belief and attendance at worship are so sensitive, so deeply personal, and so inherently relegated to individual conscience that the state cannot under any circumstances lawfully seek to compel individual conduct.[9]

During the early 1960's, the school prayer and bible reading cases brought about the realization that the *Everson* language was not sufficiently precise to evaluate certain more ambiguous forms of possible "establishment," and the Court promulgated a more specific two-fold test for analyzing those governmental practices which did not fall clearly into the category of practices prohibited by *Everson.* This test, sometimes known as the "purpose/primary effect" test, was first articulated in *Abington School District v. Schempp,* 374 U.S. 203, 222 (1962).

> The test may be stated as follows: what are the purpose and the primary effect of the

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[9] The Government's attempted distinction between compulsory attendance and compulsory worship is—as the Court below found—completely without merit. Appendix A, p. 170. The only way in which worship can possibly be compelled is through overt actions, e.g., attending when the worshippers attend, rising when the worshippers rise, and sitting when the worshippers sit. App. 128-9.

> enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. (Citations omitted.)

In the court below, Chief Judge Bazelon held that the present case was governed by the clear and unambiguous prohibition of *Everson*, since freedom from governmental imposition of religious activity is a "core value" protected by the Establishment Clause (App. A, pp. 17a-19a). In such cases, there is no necessity for applying the "purpose and effect" test. Respondents agree with this analysis, and believe that it is dispositive of the case.

Application of the "purpose and effect" test does not alter the result. The documents cited earlier (pp. , *supra*) forcefully convey the religious purpose of the regulations—a purpose strictly forbidden under the *Schempp* test.

The most recent version of the role of compulsory chapel—*i.e.*, as a necessary secular training aid to endow cadets with an understanding of the religious backgrounds and needs of their men—is so clearly fallacious as to fall of its own weight. Not only is this stated purpose sharply contradicted by all of the pre-trial publications, but even the Superintendent of the Naval Academy was obliged to admit that a course in comparative religion "might be more effective in some ways" (Tr. 9).

The Government's contention that compulsory chapel is essential to our national security (App. 94) and is

indispensable for the effective training of military officers was carefully dissected in the court below (App. A, pp. 42a-44a) and found to be wholly lacking in evidentiary support. As Judge Leventhal has pointed out, the argument is severely undercut by the fact that 95% of the service officers do not graduate from the academies, and have never been subject to the compulsory chapel requirement.[10]

Indeed, since the filing of the Petition, it has been indicated that at least one of the affected academies has repudiated the necessity, or desirability of compulsory chapel and only reluctantly agreed to join in this petition.[11]

It is not the function of a brief in opposition to reiterate all the arguments which indicate that the decision of

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10 "The longstanding restriction of the chapel attendance obligation to Academy graduates seems to me a powerful demonstration that it is not a necessity in the making of an officer and constitutional doctrine will not support an infringement of religious liberty except on a showing of unquestioned and imperative necessity." Concurring opinion of Leventhal, J., App. A. p. 43-A.

11 "[The] United States Air Force has been quite willing to abide by the lower court's ruling to eliminate compulsory chapel. But Army and Navy apparently resisted and Defense agreed with them" *Air Force Times*, Nov. 22, 1972 (editorial). There is no reason to believe that compulsory chapel is any more essential for training cadets at West Point and midshipmen at Annapolis than for training their Air Force counterparts at Colorado Springs. Perhaps the true nature of the Government's concern was expressed by *amicus* Malley: "... and if the Naval Academy is placed under a prohibition of the Courts as to one of its practices, it may be expected that other challenges of Academy authority will be inspired." Amicus Malley, p. 3(n)

the court below was correct on the merits. These arguments are expounded at length in the opinions of Judges Bazelon and Leventhal, App. A, pp. 1a-47a. The position of the dissenting judge (which is reiterated by the Government in the Petition)—that compulsory chapel is a military necessity—is simply not supported by the record in this case.

It is ironic and disturbing that nearly two centuries after the adoption of the Bill of Rights, the department of government which is charged with defending our country and its vital freedoms now seeks to impose upon its citizens a blatantly unlawful requirement of the very sort that the First Amendment was designed to guard against (App. A, pp. 6a-10a).

The clear impropriety of the practice which the Government here seeks to defend is in no way mitigated by couching the rationale in terms of national security, as this court has recently noted in connection with an intrusion into another section of the Bill of Rights. In *United States v. United States District Court for the Eastern District of Michigan, et al.*, ___ U.S. ___, 32 L.Ed.2d 752, decided June 19, 1972, this Court rejected the Government's claimed right to conduct warrantless wire-tapping of domestic organizations, despite contentions that such electronic surveillance was essential to the national security. The language of Justice Douglas in his concurring opinion is, we submit, directly applicable to and dispositive of the case at bar:

> When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights

from the corrosive environment of precisely such expedients . . . Chief Justice Warren put it this way in *United States v. Robel*, 389 U.S. 258, 264: "The concept of 'national defense' cannot be deemed an end in itself, justifying any . . . power designed to protect such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this nation apart. . . . It would be indeed ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make the defense of the Nation worthwhile." *Ibid.*, 32 L.Ed.2d at 775.

CONCLUSION

For the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted,

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November 1972.

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Brief in Opposition to Petition for Certiorari were delivered by hand to Erwin Griswold, Solicitor General of the United States, this 27th day of November, 1972.

WARREN K. KAPLAN